

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2661-CR

Cir. Ct. No. 2013CM391

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSHUA D. WINBERG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Reversed and cause remanded for further proceedings.*

¶1 HOOVER, P.J.¹ The State of Wisconsin appeals an order granting Joshua Winberg's suppression motion. The circuit court granted the suppression

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motion after determining Winberg was unlawfully seized. We conclude Winberg was not unlawfully seized, and we reverse and remand for further proceedings.

BACKGROUND

¶2 The State charged Winberg with second-offense operating while intoxicated, second-offense operating with a prohibited alcohol concentration, possession of THC, and possession of drug paraphernalia. Winberg brought a suppression motion challenging the traffic stop.

¶3 At the suppression hearing, officer Wayne Bjorkman testified he stopped the vehicle because the vehicle was registered to a female who had a revoked license. Bjorkman explained he was traveling behind the vehicle and could not see who was driving. After Bjorkman stopped the vehicle, but before he made contact with Winberg, Bjorkman realized the driver was male and therefore not the female registered owner.

¶4 Winberg testified Bjorkman knew the registered female owner was not driving because Bjorkman made eye contact with him as Bjorkman drove through a Kwik Trip parking lot before the stop. Bjorkman, however, testified he did not recall seeing Winberg in the parking lot.

¶5 Before allowing the parties to present argument, the circuit court granted the suppression motion, reasoning Bjorkman's assumption that a registered owner would be operating his or her vehicle could only be a hunch and, as a result, Bjorkman unlawfully stopped the vehicle based on a hunch. At that point, the State and Winberg both advised the court that, pursuant to *State v. Newer*, 2007 WI App 236, ¶¶5, 7, 306 Wis. 2d 193, 742 N.W.2d 923, law enforcement is permitted to stop a vehicle whose owner has a revoked license as

long as the officer is unaware of any factors that suggest the owner is not driving. Winberg explained this is why he was going to argue that, at the moment of the stop, Bjorkman knew Winberg, and not the registered female owner, was driving.

¶6 Winberg then asserted, assuming the court found that Bjorkman was unaware of who was driving when he stopped the vehicle, that as soon as Bjorkman realized Winberg was not the female registered owner “any continued detention of the vehicle is dispelled and ... further contact ... is not reasonable.” The court adopted Winberg’s second argument and concluded that, once Bjorkman, pursuant to Bjorkman’s testimony, saw the driver was male and not female, any further intrusion was unlawful and the stop should have ended. It reaffirmed its grant of Winberg’s suppression motion.

¶7 The State moved for reconsideration. In its motion, the State argued that even though Bjorkman realized after the stop the driver was not the female registered owner, Bjorkman was still permitted to make contact with Winberg and ask for his name and identification. In support, the State relied on *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462.

¶8 In response, Winberg wrote a letter to the court, stating

Based upon the law in Wisconsin, both statutory and case law, the officer did have the right under the facts of the case ... to stop the motor vehicle which was being driven by Mr. Winberg. Additionally, ... at the time that the motor vehicle was stopped, the law enforcement officer had the right to request that Mr. Winberg provide to the officer his driver’s license. However, any actions by the officer above and beyond those two actions as stated were illegal under the facts of the case.

Winberg then explained the State may have been confused about what issues he was actually challenging in regard to the stop. He asked the court to reopen evidence.

¶9 The State replied that the transcript revealed it addressed the issues Winberg challenged at the original suppression hearing. In any event, the State explained that pursuant to *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), Bjorkman was permitted to extend the traffic stop if, during the course of the lawful stop, Bjorkman became aware of additional suspicious factors giving rise to an articulable suspicion that Winberg was committing an offense separate and distinct from the initial stop. The State argued that Winberg knew from the police reports that Bjorkman would testify that “immediately upon his making contact with the defendant, Officer Bjorkman detected a strong odor of intoxicants coming from the defendant’s breath. He also noted that the defendant’s eyes appeared bloodshot and glazed over and he noted that the defendant’s speech was slurred when he spoke.” The State argued that, based on those indicators, Bjorkman lawfully extended the traffic stop to conduct an operating while intoxicated investigation.

¶10 At the next hearing, the State presented Bjorkman to testify about his observations while making contact with Winberg. However, before allowing testimony, the court questioned the parties about Bjorkman’s ability to even make contact with Winberg and ask for his identification. The State explained *Williams*, 258 Wis. 2d 395, allowed Bjorkman to make contact with Winberg. The court, however, concluded “at the instant [Bjorkman] identified the driver as not the person he suspected, that it became a new stop, a new investigation, and he has no right at that point without reasonable suspicion to detain this driver.” The court

stated that it based its decision on *State v. House*, 2013 WI App 111, 350 Wis. 2d 478, 837 N.W.2d 645. The State appeals.

DISCUSSION²

¶11 We review a circuit court’s decision on a suppression motion under a two-part standard of review. *State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. We review findings of fact under the clearly erroneous standard, and we independently review the application of law to those facts. *Id.*

¶12 On appeal, the State argues the circuit court erred by granting the suppression motion because: (1) Bjorkman lawfully stopped the vehicle pursuant to *Newer*, 306 Wis. 2d 193; (2) once stopped, and after Bjorkman realized the driver was not the registered owner, Bjorkman lawfully made contact with the driver and asked for his identification pursuant to *Williams*, 258 Wis. 2d 395; and, (3) while making contact with Winberg, if Bjorkman observed additional suspicious factors that gave rise to reasonable suspicion that Winberg was impaired, Bjorkman could lawfully extend the stop pursuant to *Betow*, 226 Wis. 2d 90. The State also contends the circuit court’s reliance on *House*, 350 Wis. 2d 478, to conclude that Bjorkman could not make contact with Winberg was misplaced.

¶13 We agree with the State. The first issue is whether Bjorkman lawfully stopped the vehicle. In the circuit court, the parties agreed Bjorkman

² In their briefs, both parties impermissibly cite and discuss an unpublished per curiam decision, which will not be discussed further. See WIS. STAT. RULE 809.23(3)(b).

lawfully stopped the vehicle pursuant to *Newer*, 306 Wis. 2d 193.³ On appeal, Winberg backpedals from this concession.⁴ Winberg emphasizes his testimony from the suppression hearing—that Bjorkman made eye contact with him in a parking lot before the stop. Winberg argues Bjorkman knew before the stop that the registered owner was not driving and, as a result, the stop was unlawful.

¶14 We reject Winberg’s argument. At the suppression hearing, Bjorkman testified that he knew the registered owner had a revoked license, that he could not see who was driving before stopping the vehicle, and that he stopped the vehicle because of the revoked license. By ultimately conceding in the circuit court that Bjorkman’s testimony supported the stop, Winberg forfeited his right to argue on appeal that other facts show Bjorkman knew the registered owner was not driving at the time of the stop. *See Bergmann v. McCaughtry*, 211 Wis. 2d 1, 7, 564 N.W.2d 712 (1997) (factual concession is binding). We conclude Bjorkman lawfully stopped the vehicle based on *Newer*, 306 Wis. 2d 193.

³ In *State v. Newer*, 2007 WI App 236, ¶7, 306 Wis. 2d 193, 742 N.W.2d 923, we determined it was reasonable for an officer to assume the person driving a particular vehicle was the vehicle’s owner. We concluded that, as long as the officer remains unaware of any facts which would render that assumption unreasonable, knowledge that the owner of a vehicle has a revoked license is enough to form “reasonable suspicion of criminal activity” when an officer observes the vehicle being driven. *Id.*, ¶¶5, 7.

⁴ At the motion for reconsideration hearing, the following exchange took place:

The Court: It’s clear that Officer Bjorkman’s original stop is permissible [Defense counsel] doesn’t disagree with that. Is that right?

[Defense Counsel]: Under the facts of this case and based on the testimony of the officer, the law says that he had the right to stop the car for the purposes of securing the identification of the driver.

¶15 We next turn to whether Bjorkman was still permitted to make contact with Winberg after he realized the driver he had stopped was male and therefore not the female registered owner. The circuit court concluded Bjorkman was not permitted to make contact with Winberg and granted the suppression motion. The State argues that, pursuant to *Williams*, “Bjorkman was authorized to make contact with [Winberg], even though [Bjorkman] determined as he walked up to the vehicle and before he made contact with the driver, that the driver was not the female registered owner with the revoked driver’s license[.]” The State also contends the court’s reliance on *House* was misplaced.

¶16 In *Williams*, an officer stopped Williams’ vehicle on the suspicion that Williams was a suspect in a domestic abuse case. *Williams*, 258 Wis. 2d 395, ¶¶2-3. Williams was not the domestic abuse suspect. *Id.*, ¶3. On appeal, Williams argued the officer did not have reasonable suspicion to support the stop, and, in any event, as soon as the officer looked at him and saw he was not the domestic abuse suspect, the officer was required to terminate the stop. *Id.*, ¶18. We first determined, based on the totality of the circumstances, the officer had reasonable suspicion to stop Williams’ vehicle on the suspicion that Williams was the domestic abuse suspect. *Id.*, ¶14. We then concluded that, because Williams had been lawfully stopped, it was reasonable for the officer to ask Williams for his name and identification, even if at the time the officer made this request, the officer knew Williams was not the domestic abuse suspect. *Id.*, ¶¶18, 21-22. We concluded the request for identification did not transform the lawful stop into an unlawful seizure. *Id.*, ¶¶21-22.

¶17 In *House*, an officer lawfully stopped a vehicle for operating with a suspended registration. *House*, 350 Wis. 2d 478, ¶2. The officer issued House a warning for operating with a suspended registration and returned House’s driver’s

license. *Id.* The officer then retrieved his police dog from his vehicle, returned to House's vehicle, and conducted a sniff test for controlled substances. *Id.* The dog alerted, and House was ultimately arrested for possession of a controlled substance. *Id.*

¶18 On appeal, House argued he was unlawfully seized when the controlled substances were discovered. *Id.*, ¶3. We noted a seizure is reasonable, and therefore lawful, if (1) the seizure was justified at its inception, and (2) the officer's actions were reasonably related in scope to the circumstances justifying the interference. *Id.*, ¶5. Because House conceded he was lawfully stopped, we focused our inquiry on whether the officer's continued detention to conduct the sniff test, after the officer returned House's license and issued the warning, was reasonably related in scope to the purpose of the stop, which was having a suspended registration. *Id.* We determined that, at the moment the officer decided to conduct the sniff test, the purpose of the initial stop had been satisfied and, as a result, the officer's continued detention was not reasonably related in scope to the circumstances justifying the initial stop. *Id.*, ¶10. We specifically noted there were no arguments made that the officer was permitted to prolong the traffic stop based on observations the officer made after stopping the vehicle. *Id.*, ¶10 n.2. We therefore concluded House was unlawfully seized when the officer discovered the controlled substances. *Id.*, ¶11.

¶19 Here, unlike *House*, Bjorkman's action in making contact with Winberg after he realized that Winberg was not the registered driver was still related in scope to the circumstances justifying the initial stop. As established in *Williams*, if a driver is lawfully stopped, it is reasonable for the officer to ask the driver for his or her name and identification, even if at the time the officer makes this request, the suspicion supporting the stop has been dispelled. *Williams*, 258

Wis. 2d 395, ¶¶18, 21-22. Nothing in *House* establishes that an officer must abandon the traffic stop before making contact with the driver. Rather, *House* prohibits officers from prolonging traffic stops to conduct separate investigations without reasonable suspicion. Bjorkman’s action of asking for Winberg’s name and identification was not a separate investigation and therefore did not constitute an unlawful seizure. Accordingly, we reverse the circuit court’s grant of Winberg’s suppression motion.

¶20 The final issue is whether, pursuant to *Betow*, 226 Wis. 2d 90, Bjorkman would be permitted to extend the traffic stop to conduct an operating while intoxicated investigation. On appeal, Winberg appears to suggest that Bjorkman must ignore any observations he made while asking for Winberg’s identification and, instead, may only conduct an operating while intoxicated investigation if the observations Bjorkman made before the stop amounted to reasonable suspicion of impairment. To the extent this is Winberg’s argument, we disagree.

¶21 In *Betow*, we concluded that:

Once a justifiable stop is made ... the scope of the officer’s inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer’s attention—keeping in mind that these factors, like the factors justifying the stop in the first place, must be “particularized” and “objective.” ... If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

Betow, 226 Wis. 2d at 94-95 (citation omitted).

¶22 Therefore, Bjorkman would be permitted to extend the traffic stop to conduct an operating while intoxicated investigation if Bjorkman observed additional suspicious factors while making contact with Winberg that gave rise to reasonable suspicion that Winberg was impaired. However, because Winberg did not challenge the stop on this basis at the original suppression hearing, there is no factual record as to what Bjorkman observed when he made contact with Winberg. Accordingly, we do not address the matter further.⁵

¶23 In sum, we conclude that Bjorkman lawfully stopped Winberg's vehicle. We also conclude that, after Bjorkman stopped the vehicle and realized the registered female owner was not driving, Bjorkman lawfully made contact with Winberg pursuant to *Williams*. We therefore reverse the circuit court's grant of the suppression motion on that basis and remand for further proceedings.

⁵ We observe Winberg argues in his brief, without citation to the record, that “[d]efense counsel made an offer of proof that the officer would testify about [the] odor of intoxicants, bloodshot eyes and slurred speech, but the judge determined that those ‘indicators’ did not provide adequate reasonable suspicion to turn this stop into an OWI detention and properly suppressed the stop.” We admonish Winberg that the circuit court did not grant the suppression motion on the basis that Bjorkman did not observe enough indicators of impairment after making contact with Winberg—the court granted the motion on the basis that Bjorkman was not permitted to even make contact with Winberg. Further, to the extent Winberg concedes that, when Bjorkman made contact with him to ask for his identification, Bjorkman observed the odor of intoxicants, his bloodshot eyes, and his slurred speech, these indicia of impairment, combined with the fact that the traffic stop occurred at 12:50 a.m., would give rise to a reasonable articulable suspicion that Winberg was operating while impaired and would allow Bjorkman to extend the traffic stop to investigate his suspicion. See *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999); see also *State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (time of night, even 9:30 p.m., “lend[s] some further credence” to impairment determination).

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

